CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 **MAY 11, 1994** **NO. 19**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 94–43)

RECORDATION OF TRADE NAME: "PRESENTENSE"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On February 3, 1994, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "PresenTense," was published in the Federal Register (59 FR 5221). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received not later than April 4, 1994. No responses were received in opposition to the notice. Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "PresenTense," is recorded as the trade name used by MGP Corporation, a corporation organized under the laws of the State of Virginia, located at 21440 Pacific Boulevard, Sterling, Virginia 20167. The trade name is used in connection with household ceramic articles, including tableware and dinnerware.

EFFECTIVE DATE: May 2, 1994.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229 (202–482–6960).

Dated: April 22, 1994.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, May 2, 1994 (59 FR 22713)]

U.S. Customs Service

General Notice

CHANGE IN CURRENT STATUS OF TRADEMARKS OWNED BY CALVIN KLEIN COSMETICS CORPORATION AND RECORDED WITH U.S. CUSTOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice informing importers and other members of the trading community of a change in the current status of two trademarks owned by Calvin Klein Cosmetics Corporation which are recorded with Customs Intellectual Property Rights Branch (Office of Regulations & Rulings).

SUMMARY: This notice informs importers and other members of the trading community that two trademarks owned by Calvin Klein Cosmetics Corporation which are recorded with U.S. Customs are not entitled to "gray market" protection. Effective April 20, 1994, foreign-made articles bearing the genuine mark (so-called parallel imports or "gray market" goods) may be imported into the United States without restriction.

EFFECTIVE DATE: April 20, 1994.

FOR FURTHER INFORMATION CONTACT: Vicki E. Allums, Intellectual Property Rights Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W., Franklin Court, Suite 4000, Washington, D.C. 20229; telephone (202) 482–6960.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This notice informs importers and other members of the trading community that effective April 20, 1994, the following trademarks owned by Calvin Klein Cosmetic Corporation and recorded with U.S. Customs are not entitled to "gray market" protection:

"ETERNITY" (PTO Trademark Registration No. 1,605,215; Customs Recordation No. TMK91–00674)

"Design of ETERNITY for Men Bottle" (PTO Trademark Registration No. 1,712,934; Customs Recordation No. TMK93–00170)

Therefore, foreign-made articles bearing the genuine trademarks ("gray market" goods) referenced above may be imported into the United States without restriction. This is consistent with the treatment of the other trademarks owned by Calvin Klein Cosmetic Corporation which are recorded with Customs Intellectual Property Rights Branch. Customs automated database of records for these two trademarks has been amended to reflect the change.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's unpublished order entered on April 15, 1994, is being published by the Clerk's Office as Slip Op. 94–62 on April 18, 1994.

(Slip Op. 94–62)

WIN-TEX PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND MILLIKEN CO., DEFENDANT-INTERVENOR

Court No. 92–04–00302

(Dated April 14, 1994)

ORDER

NEWMAN, *Senior Judge:* Upon consideration of defendant's cross motion for vacatur and plaintiff's and defendant-intervenor's responses, it is hereby

ORDERED that defendant's cross motion for vacatur is granted; and it is further

ORDERED that the opinion and order entitled *Win-Tex Products, Inc. v. United States,* Slip Op. 93–145 (Aug. 5, 1993), 829 F. Supp. 1343 (CIT 1993) is vacated.

(Slip Op. 94–63)

JEUMONT SCHNEIDER TRANSFORMATEURS, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ABB POWER T&D CO., INC., DEFENDANT-INTERVENOR

Court No. 93–09–00646

[Remanded.]

(Dated April 20, 1994)

Wilmer, Cutler & Pickering (John D. Greenwald and *Ronald I. Meltzer)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer* and *John C. Erickson III), Marguerite E. Trossevin,* Attorney Advisor, United States Department of Commerce, of counsel, for defendant.

Steptoe & Johnson (Richard O. Cunningham, Robert J. Sokota and *Eric C. Emerson)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court for judgment upon the agency record pursuant to USCIT Rule 56.2. Plaintiff challenges the final results of the fifth administrative review of the antidumping finding concerning *Large Power Transformers from France,* 58 Fed. Reg. 44,497 (Dep't Comm. 1993) (final admin. review) *("Final Review").* The issue before the court is whether the United States Department of Commerce applied an appropriate antidumping duty deposit rate to "new shippers.

BACKGROUND

Prior to 1991, after each periodic administrative review Commerce set two deposit rates for the upcoming importing period for shippers who had never been reviewed and had therefore never been assigned a company specific rate. Old unreviewed shippers were assessed duties for the period of review based on their existing deposit rates and that rate remained the deposit rate for the upcoming period. Shippers entering the U.S. market during the review period were assigned a deposit rate based on the highest calculated rate for any shipper reviewed during the review period, the so-called "new shipper" rate.[1]

After being advised by Customs that the dual deposit rate structure was not administrable due to uncertainty as to who were new and old shippers, Commerce decided to apply the new shipper rate as the across-the-board, i.e. "all others," deposit rate for unreviewed shippers. In *Federal-Mogul Corp. v. United States,* 822 F. Supp. 782, 788 (Ct. Int'l Trade 1993), and *Floral Trade Council v. United States,* 822 F. Supp. 766, 771 (Ct. Int'l Trade 1993) *("Floral Trade II"),* the court found that a single all others deposit rate based on the new shipper rate was invalid as to "old shippers." The court held that for unreviewed "old shippers," the plain language of 19 C.F.R. § 353.22(e) (1991) and (1992) required assessments and new deposits to be based on past deposit rates. *Federal-Mogul,* 822 F. Supp. at 787–88; *Floral Trade II,* 829 F. Supp. at 771. The regulation's purpose is to bring stability to the rate assignment process and to avoid unnecessary administrative review requests by parties who are basically satisfied by the existing rate. *See Floral Trade II,* 829 F. Supp. at 770–71; *Antidumping Duties,* 54 Fed. Reg. 12,742, 12,757 (Dep't Comm. 1989) (final rule). Commerce, therefore, had the choice of complying with the court's decision by establishing a multiple-rate system for unreviewed shippers or by applying the "all others" deposit rate for "old shippers" to all unreviewed shippers. Subsequently, in reaction to the court opinions, Commerce adopted a single "old shipper" rate policy rather than a policy permitting multiple rate structures.

Under 19 C.F.R. § 353.22(e) (1993), any rate assigned remains the rate for that shipper until that rate is individually reviewed. The shipper, the importer or an interested domestic party may request a review.

[1] The "new shipper" rate is a rate calculated from current data, as opposed to a best information available ("BIA") rate. *See* 19 U.S.C. § 1677e(c) (1988).

See 19 U.S.C. § 1675(b) (1988); 19 C.F.R. §§ 353.2(k), 353.22(a) (1993). Thus, what is at issue here is the first deposit rate set for a new shipper, not its assessment rate or future deposit rates. Presumably, unless the cost of participating in a review outweighs the benefits to be gained, the new shipper will request a review if he is dissatisfied with the initial deposit rate. In the preliminary determination in this case, pursuant to its then practice, Commerce assigned plaintiff an initial deposit rate of 1.82 percent, the highest calculated rate for the current period, i.e., the "new shipper" rate. *Large Power Transformers from France,* 57 Fed. Reg. 53,467, 53,467 (Dep't Comm. 1992) (prelim admin. review). The court opinions intervened and in the final determination a 24 percent rate was assigned. *Final Review,* at 44,498.

The 24 percent rate selected by Commerce is the rate from the original Treasury Department less than fair value ("LTFV") investigation in this case. *Id.;* 47 Fed. Reg. 10,268, 10,269 (Dep't Comm. 1982). For its own LTFV determinations, Commerce is able to use the "all others" rate found therein. The "all others" rate is often an averaged rate. *Floral Trade Council v. United States,* 799 F. Supp. 116, 117 (Ct. Int'l Trade 1992) *("Floral Trade I").* Commerce is not always able to determine an "all others" rate from the predecessor Treasury Department findings. *See Final Review,* at 44,498. In such a case, it chooses to use the highest rate calculated by Commerce in the first administrative review, i.e., the "new shipper" rate. *Id.* In this case the only rate set in the LTFV investigation and the only rate set in the first administrative review, a BIA rate, are the same 24 percent rate. Thus, we are not called upon to determine whether the first review period "new shipper" rate is a correct rate to apply if it varies from the LTFV rate.

Plaintiff objects to both the procedure used to implement the new policy and to the imposition of the 24 percent deposit rate. It seeks reinstitution of the 1.82 percent rate, the highest calculated rate in the period in which it entered the U.S. market.

Discussion

Despite the somewhat complicated background explanation, the issue here is not terribly complex, that is, even though Commerce could have, under its regulation, utilized a multiple "all others" rate structure, did it abuse its discretion in utilizing the only unitary rate available to it here? As a general matter, the solution selected by Commerce is probably a sensible alternative for many cases. The original rate may be somewhat stale for new companies,[2] but Customs does appear to have an administrative problem with a multiple rate structure, at least for some products. *See Floral Trade I,* 799 F. Supp. at 118. Commerce's new practice, however, has not been reduced to a regulation, and it was not circulated for general comment prior to adoption. Rather, Commerce was required to abandon immediately its interim practice, and the court views its

[2]The LTFV rate used here is particularly aged. It is also not an average rate. It is the rate for one company during the 1970's. *See* 47 Fed. Reg. at 10,268–69.

action here as simply application of the newly interpreted 19 C.F.R. § 353.22(e) to particular facts.[3] Commerce's approach, however, is subject to argument and adjustment for good reason in a particular case. Depending on the degree of Customs' difficulties and the relative need for a steady general practice there may be differing outcomes, particularly during this transitional period. Because there is, as yet, no binding rule, Commerce is free within the confines of the statute and the regulation to make such adjustments as are needed.

Given the dramatic change in practice between the preliminary and final determinations, allowance of a period of comment in this case to assess particular problems created by the change in rate selection procedures and the equities involved was necessary. In this case plaintiff had no opportunity to distinguish the state of its industry from that described in *Floral Trade I*, to present any equitable arguments attributable to the post-importation change in policy or to propose a reasonable alternative. Furthermore, Commerce did not have an opportunity to assess those arguments and to render a reasoned determination in response. Accordingly, the court is not in a position to determine if Commerce acted arbitrarily or abused its discretion, and this matter must be remanded.

Commerce shall within 45 days accept comments from plaintiff and other interested parties and render a reasoned determination as to the application of a particular deposit rate to plaintiff. Any objections may be filed within twenty days of the remand determination. Defendant may respond within fifteen days thereafter.

(Slip Op. 94–64)

CONNECTICUT STEEL CORP, CO-STEEL RARITAN, GEORGETOWN STEEL CORP, KEYSTONE STEEL & WIRE CO., AND NORTH STAR STEEL TEXAS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 93–07–00382

[Plaintiffs' Rule 56.2 motion denied. Judgment for defendant.]

(Decided April 22, 1994)

Wiley, Rein & Fielding (Charles Owen Verrill, Jr., Alan H. Price, Willis S. Martyn III, Peter S. Jordan and *Brian E. Rosen)*, for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel, United States International Trade Commission *(Rhonda M. Hughes)*, for defendant.

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[3] The court has trouble viewing the selection of the single rate as opposed to a multiple rate structure as an interpretive rule. The interpretation of the applicable regulation has already been made by the court and it permits a variety of results. An interpretive rule, in contrast, is "an agency statement of general or particular applicability and future effect," 5 U.S.C. § 551(4) (1988), which is not binding on the courts. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 315–16 (1979).

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiffs, Connecticut Steel Corporation, Co-Steel Raritan, Georgetown Steel Corporation, Keystone Steel & Wire Company, and North Star Steel Texas, Inc., move for judgment on the agency record pursuant to USCIT R. 56.2, contesting the negative preliminary determination of the United States International Trade Commission in *Certain Steel Wire Rod From Trinidad and Tobago,* Inv. No. 731–TA–649 (Preliminary), USITC Pub. 2647 (June 1993), 58 Fed. Reg. 33,280 (1993) The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(1) (1988) and 28 U.S.C. § 1581(c) (1988). Plaintiffs' motion is denied.

BACKGROUND

Plaintiffs filed a petition with the Commission and the Department of Commerce in April 1993, alleging that imports of certain steel wire rod from Brazil, Canada, Japan, and Trinidad and Tobago, were sold in the United States at less than fair value (LTFV) and that such imports materially injured the domestic industry. Accordingly, the Commission instituted a preliminary antidumping duty investigation pursuant to 19 U.S.C. § 1673b(a) (1988). During the investigation, the Commission received information from responses to its questionnaires to importers, foreign producers and domestic producers. It also received information from the American Wire Producers' Association (AWPA), a trade association representing domestic producers of steel wire rod and wire products, which conducted a survey of its members who purchased wire rod from domestic and imported sources to manufacture wire products. Upon considering the evidence, the Commission determined, by a 5–1 vote, that there was no reasonable indication that the domestic industry was materially injured or threatened with material injury by reason of the alleged LTFV imports from Trinidad and Tobago; the Commission also determined that there was a reasonable indication that the domestic industry was materially injured by reason of the alleged LTFV imports from Brazil, Canada and Japan.[1] *Certain Steel Wire Rod From Brazil, Canada, Japan, and Trinidad and Tobago,* Invs. Nos. 731–TA–646–649 (Preliminary), USITC Pub. 2647 (June 1993); 58 Fed. Reg. 33,280 (1993).

The Commission's negative determination regarding Trinidadian imports was based on a number of factors. The Commission found that the volume and market share of the Trinidadian imports increased but remained low throughout the period of investigation, that customers purchased steel wire rod from Trinidad and Tobago for non-price reasons, such as to maintain an offshore source and to reduce the risk of disruption of domestic production and allocations, and that there was a clear pattern of overselling of U.S. products by the Trinidadian imports (i.e., imports priced higher than like domestic products). With respect to

[1] The Commission is required to separately assess the impact of imports from Trinidad and Tobago because it is designated as a beneficiary country under the Caribbean Basin Economic Recovery Act. 19 U.S.C. § 1677(7)(C)(iv)(II) (1988).

the negative threat determination in particular, the Commission found that there was no indication of price depression or suppression due to the Trinidadian imports, that the capacity utilization of the sole wire rod producer in Trinidad and Tobago, Caribbean Ispat Ltd. (Ispat), was very high, and that Ispat had numerous other traditional export markets accounting for the bulk of its production and was unlikely to shift the exports to the United States in the event that antidumping duties were levied on imports from Brazil, Canada and Japan.

Plaintiffs allege that the Commission's negative determination violates the letter and the spirit of the legal standard for preliminary investigations and request the case be remanded to the Commission for a redetermination.

DISCUSSION

1. *Standard of Review:*

This court will uphold the Commission's negative preliminary injury determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A) (1988). The court shall apply traditional administrative law principles in review of the Commission's preliminary determination, and the review is "to ascertain whether there was a rational basis in fact for the determination." *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 58–59. 785 F.2d 994, 1004 (1986) (quoting S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 638).

In a preliminary antidumping investigation, the Commission is required to determine, based on the best information available to it at the time of the preliminary determination, whether there is a reasonable indication that an industry in the United States is materially injured or is threatened with material injury by reason of imports of the merchandise under investigation. 19 U.S.C. § 1673b(a). The Commission has interpreted the statutory "reasonable indication" standard as requiring that a negative preliminary determination of injury be reached only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of injury by reason of imports, and (2) no likelihood exists that contrary evidence will arise in a final investigation. The Commission's interpretation of the statutory standard was upheld by the Court of Appeals for the Federal Circuit. *American Lamb,* at 55, 785 F.2d at 1001.

2. *The Standard of Clear and Convincing Evidence:*

Plaintiffs assert that the Commission's determination was arbitrary, capricious, an abuse of discretion and not in accordance with law because it was not supported by clear and convincing evidence in the record. Plaintiffs claim that the Commission erred in making its determination based on contradictory data in the record and acted arbitrarily in ignoring evidence clearly supporting an affirmative determination.

It has been well established that, in applying the statutory standard of "reasonable indication" of injury, the Commission may weigh all the evi-

dence and resolve conflicts in the evidence. *See American Lamb,* 4 Fed. Cir. (T) at 56, 785 F.2d at 1002. The Commission's weighing of evidence in a preliminary determination is necessary for the purpose of "eliminat[ing] unnecessary and costly investigations which are an administrative burden and an impediment to trade." *Id.* at 57, 785 F.2d at 1002–3 (quoting S. Rep. No. 1298, 93rd Cong., 2d Sess. 171, *reprinted in* 1974 U.S.C.C.A.N. 7186, 7308) In asserting that the evidence supporting the Commission's determination is not clear and convincing because of the conflicting evidence in the record, plaintiffs request the court to reweigh the evidence. The court, however. cannot substitute its judgment for that of the Commission. Its role is to ascertain whether there was a rational basis for the determination, not to decide whether it would have made a different decision on the basis of the evidence. *Torrington Co. v. United States,* 16 CIT ___, ___, 790 F. Supp. 1161, 1167 (1992) (citing *American Lamb,* 4 Fed. Cir. (T) at 59, 785 F.2d at 1004; *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984)), *aff'd* 11 Fed. Cir. (T) ___, 991 F.2d 809 (1993) The court may reverse the Commission's determination only where there is "a clear error of judgment" and where "there is no rational nexus between the facts found and the choices made." *Jeannette Sheet Glass Corp. v. United States,* 11 CIT 10, 15, 654 F. Supp. 179, 183 (1987) (citations omitted).

Plaintiffs also assert that, under *American Lamb,* the Commission's determination must address whether particular evidence is clear and convincing and why that evidence forecloses further inquiry. Based on this assumption, plaintiffs attack individual pieces of evidence relied upon by the Commission as not clear and convincing. Plaintiffs, however, misstate the Commission's standard for reaching a negative determination. Rather than requiring each piece of evidence to be found clear and convincing the standard approved by *American Lamb* requires that "the record as a whole" contain clear and convincing evidence that there is no material injury or threat of injury by reason of imports. *American Lamb,* 4 Fed. Cir. (T) at 55, 785 F.2d at 1001.

Plaintiffs further claim that the Commission's determination was arbitrary because it failed to discuss conflicting evidence provided by plaintiffs and failed to make a finding, and to provide explanations for such a finding, that its determination is supported by clear and convincing evidence and that no likelihood exists that contrary evidence will arise in a final investigation. "[T]here is no statutory requirement that the Commission must respond to each piece of evidence presented by the parties." *Torrington,* 790 F. Supp. at 1168 (citation omitted). The standard of clear and convincing evidence and no likelihood of future contrary evidence was set by the Commission in implementing the statutory standard of "no reasonable indication" of injury, and that standard was affirmed by the court as "permissible within the statutory framework." *American Lamb,* 4 Fed. Cir. (T) at 55, 785 F.2d at 1001. The Commission, however, is not required by law, nor has it developed a

practice, to make an explicit finding that the standard has been met and to explain why it so finds. "A court may 'uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Ceramica Regiomontana, S.A. v. United States,* 5 Fed. Cir. (T) 77, 78, 810 F.2d 1137, 1139 (1987) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281 286 (1974); *Colorado Interstate Gas Co. v. FPC,* 324 U.S. 581, 595 (1945)).

3. *Commission's Reliance on Certain Data:*

Plaintiffs' major complaint in this case is that the Commission relied solely upon data compiled from its own questionnaires and failed to consider the data provided by the AWPA survey which, according to plaintiffs, indicated many more instances of underselling by the Trinidadian imports and contained other pricing information supporting an affirmative determination. Plaintiffs contend that the AWPA survey provided a more reliable source of information because it covered more purchasers and products of the Trinidadian imports than the Commission questionnaires did.

"Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record." *Rhone Poulenc, S.A. v. United States,* 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984) (citations omitted). That presumption is supported by the record of this case, which shows that the AWPA survey was referred to in several places in the Commission's Report. *See* USITC Pub. 2647 at I–50, n. 79; I–51, n. 84; I–52, n. 87; I–53, n. 91 In one place, the Report indicated that the Commission questionnaires requested price and quantity information on a quarterly basis; while the AWPA survey also provided pricing information, most of the AWPA data was compiled on an annual basis. *Id.* at I–53, n. 91 These discussions of the AWPA survey show that the Commission did not ignore the AWPA data; rather, it considered such data and decided not to rely on them for a reason.

The statute requires the Commission to make a preliminary determination "based upon the best information available to it at the time of the determination." 19 U.S.C. § 1673b(a) The court finds the Commission did not abuse its discretion in deciding that the questionnaire data were the best information available to it. As plaintiffs acknowledge, the Commission does not usually seek information from purchasers in a preliminary investigation. The Commission nevertheless considered the purchaser data submitted by the AWPA, and decided not to rely on them apparently because they were not compiled on a quarterly basis. *See* USITC Pub. 2647 at I–53, n. 91. Moreover, the Commission found the AWPA data in general showed "a mixture of both underselling and overselling." USITC Pub. 2647 at 1–53, n. 91. Even plaintiffs admit—despite their claim that the AWPA data contained "substantial evidence" of underselling—that the AWPA data showed more instances of overselling than underselling. Pls. Br. at 11. Thus, the AWPA data do not in themselves contradict the Commission's finding that there was a clear pattern of overselling.

In addition, plaintiffs challenge the Commission's reliance upon the volume of imports rather than the rate of increase in the threat-of-injury determination, and its reliance upon certain information in making findings regarding the capacity utilization of Ispat, the significance of inventory levels, and the indication of price suppression or depression. As plaintiffs acknowledge, the Commission has discretion in deciding upon these matters in the preliminary determination. The court is satisfied after reviewing the record that the Commission did not abuse its discretion.

4. *No Likelihood of Future Contrary Evidence:*

Plaintiffs contend that since the AWPA survey contained purchaser data similar to what the Commission would receive in a final investigation and since such data revealed a substantial amount of underselling, the Commission could not reasonably conclude that there is no likelihood that contrary evidence will arise in the final investigation. Even assuming that the AWPA data did contradict the Commission's questionnaire data, the mere presence of conflicting data does not establish the likelihood that contrary evidence will arise in the final investigation. "The statute calls for a reasonable indication of injury, not a reasonable indication for further inquiry." *American Lamb,* 4 Fed. Cir. (T) at 55, 785 F.2d at 1001. Given that the Commission weighed the evidence in the record and that its negative determination was based on multiple factors, including the volume of imports, the pattern of overselling, the level of capacity utilization, indication of price depression or suppression, and the likelihood of market shifting, *see* USITC Pub. 2647 at 29, the court finds that there was a rational basis for the Commission's conclusion that no likelihood exists that contrary evidence will arise in a final investigation.

5. *Finding on Price Sensitivity of the Industry in Previous Investigations:*

Plaintiffs contend that the Commission erred in focusing its determination on the low volume of imports without considering the price sensitivity of the U.S. wire rod industry. According to plaintiffs, it is well recognized that a small quantity of low-priced imports can have a considerable effect on the market for fungible products, and the Commission had previously found that "one fundamental characteristic of carbon steel wire rod is its basic fungibility and price sensitivity within each of the three carbon categories." Pls. Br. at 19 (quoting *Carbon Steel Wire Rod from the German Democratic Republic,* ITC Pub. 1607 at 8–9 (1984) (Inv. No. 731–TA–205) (preliminary); *accord Carbon Steel Wire Rod from Brazil and Trinidad and Tobago,* ITC Pub. 1444 at 12 (1983) (Inv. No. 731–TA–113–114) (final)) Plaintiffs claim that the Commission ignored the evidence of price sensitivity produced by plaintiffs, and that the Commission abused its discretion in failing to follow or to explain its departure from previous findings that the U.S. wire rod industry is price sensitive. Pls.' Reply at 21 (quoting the rule that "an agency must either conform itself to its prior decisions or explain the

reasons for its departure" from *Citrosuco Paulista, S.A. v. United States.*,12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988)).

"The Commission has discretion to ascertain which economic factors are relevant in an investigation and the weight to be given those factors." *Torrington,* 790 F. Supp. at 1170 (citations omitted). The court has long recognized that

> each injury investigation is *sui generis,* involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation.

Citrosuco Paulista, 12 CIT at 1209, 704 F. Supp. at 1087–88 (quoting *Armstrong Bros. Tool Co. v. United States,* 84 Cust. Ct. 102, 115, CD. 4848, 489 F. Supp. 269, 279 (1980)). "Thus, the Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation." *Id.* (citations omitted). In this case, the Commission found that there was a clear pattern of overselling by the Trinidadian imports and that customers purchased the Trinidadian imports for non-price reasons. The unique combination and interaction of the economic variables could lead the Commission to reasonably conclude that price sensitivity of the industry was not a significant factor in this investigation. Although the reason for not considering price sensitivity was not explicitly given, the path of the Commission's decision is discernible. *See Ceramica Regiomontana,* 5 Fed. Cir. (T) at 78, 810 F.2d at 1139. Thus, the court finds the Commission did not abuse its discretion in not considering the factor of price sensitivity in this determination.

CONCLUSION

For reasons stated above, the court holds that the Commission's preliminary injury determination with respect to the alleged LTFV imports from Trinidad and Tobago is not arbitrary, capricious or an abuse of discretion, and is otherwise in accordance with law. Accordingly, the Commission's preliminary determination is affirmed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/43 4/19/94 DiCarlo, J.	CD Com (USA) International, Inc.	93–09–00534	8471.91.00903 3.9%	8473.30.40 Free of duty	Agreed statement of facts	Miami Mother-board without C.P.U.
C94/44 4/19/94 Aquilino, J.	Webcor Electronics, Corp.	84–10–01456	716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, or 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (1989) or Texas Instruments Inc *v.* U.S. 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C94/45 4/20/94 DiCarlo, J.	Mattel, Inc.	89–10–00571	737.49, 737.95 12.3%, 10.9%, 9.6%, 8.3%, 7.0%	912.20 Duty free (except balloons, marbles, dice, and diecast vehicles)	Mattel, Inc. *v.* U.S. 926 F.2d 1116 (1991)	Los Angeles Various toys not over five cents per unit

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V94/14 4/20/94 Carman, J.	YGM Incorporated	92–03–00195	Transaction value including buying commissions	Transaction value less buying commissions	Agreed statement of facts	Seattle Wearing apparel

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